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IN THE

Supreme Court of the United States

October Term, 1935

No. 377

ASA H. WHITFIELD,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF OF STATE OF MINNESOTA AMICUS CURIAE.

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St. Paul, Minnesota.

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MOTION FOR LEAVE TO FILE.

Now comes the State of Minnesota, appearing by its Attorney General, Harry H. Peterson, and moves this Honorable Court for permission to file a brief, amicus curiae, in support of the position of the appellee, the State of Ohio, in the above entitled appeal, before this court.

HARRY H. PETERSON,
Attorney General,
State of Minnesota,
St. Paul, Minnesota.

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BRIEF OF STATE OF MINNESOTA AMICUS CURIAE.

INTRODUCTION.

The State of Minnesota is interested in the determination of this case because it has enacted laws pursuant to the so-called Hawes-Cooper Act. Minnesota has upon its statute books two laws which were enacted because of the provisions of the Hawes-Cooper Act. They are Laws of Minnesota, 1935, Chapter 267, which provides that prison made goods shall be subject to the Laws of the State of Minnesota immediately upon arrival therein and shall not be exempt from such laws by reason of being introduced in the original pack-

age or otherwise; and Laws of Minnesota, 1935, Chapter 268, which requires all prison made goods offered for sale within the State to be branded and marked as such and providing penalties for sales and violation thereof. These laws were enacted to supplant Laws of Minnesota, 1929, Chapter 138, which contains somewhat similar regulations. Each of these is printed in the appendix.

The policy of the State of Minnesota with respect to prison made goods differs from that of Ohio and many other States in that it simply requires the branding and labeling of the same. Many other States have similar laws. Minnesota has pursued such a policy with respect to other goods and merchandise for many years. While Minnesota permits the sale of goods and merchandise, the traffic in which is subject to evils requiring regulatory legislation, it has enacted such laws for the protection of the public. These laws have for their purpose not only the protection of free labor, but the protection of the public against deception and fraud. In 1890 the Supreme Court of Minnesota decided a case and states the policy of Minnesota in this respect.

In Stolz v. Thompson, 44 Minn. 271, an action was brought to recover $250 for goods sold and delivered, which consisted of a product known as "Gates' Crystal Baking Powder." The defense was that this powder contained alum, but the cans and boxes were not labeled or marked in any way to show the fact and that, therefore, they were sold and disposed of to the defendant in violation of the Laws of Minnesota of 1889, Chapter 7. It was claimed that this law was unconstitutional because alum is not injurious to health, but on the contrary is a wholesome article of food. In the opinion this Court said:

"The statute does not prohibit the manufacture or sale of baking powder containing alum, but requires the fact, when alum is a constituent of it, to be disclosed in the manner specified. We have no doubt that it is within the power of the legislature to impose this requirement. We need not enter upon a consideration of the question as to whether the use of alum in food in such quantities as might be included in a baking powder is or is not injurious to health. The validity of that part of the law which we are considering does not depend upon the fact being that it is injurious. As to that fact we will only say that there has long existed a belief, more or less general, that the use of alum as an ingredient in food is harmful; and as early at least as about the middle of the last century (31 Geo. II. c. 29, § 21) the use of alum as an ingredient of bread was prohibited. Such prohibition was renewed in later statutes, and as late as 35 & 36 Vict. c. 94, its use in intoxicating liquors was prohibited. We deem it immaterial whether the enactment under consideration was induced by a belief on the part of the legislature that such use of alum was injurious, or by the supposed fact that a large proportion of the people believed it to be so, and would not purchase or use in their daily food a composition containing it, unless the fact were concealed from them. In either case the law requiring the marking of the packages containing the compound so as to show the fact would not be subject to objection on constitutional grounds. The use of such compounds, generally designated as 'baking powder,' has become very common, if not almost universal, in the preparation of food. *It cannot well be doubted that it is a common right of the people to be informed, so far as that is reasonably practicable, if the substances exposed for sale as food contain ingredients which are actually hurtful, or which they believe to be so, and which therefore they would not knowingly purchase or use.*

> "One of the grounds justifying the interference by the legislature to regulate the carrying on of ordinary business affairs is the fact that unless a preventive remedy be applied people will in general, or very commonly, be imposed upon, the circumstances being such that ordinary personal caution will be ineffectual to guard against it."

Minnesota has prison industries of its own and complies with the requirements of its statutes as to the branding and labeling of its own prison products. It is in the same position as Ohio and other States with respect to the constitutionality of the Hawes-Cooper Act, and, therefore, files this brief.

HISTORY.

Many of the States passed laws regulating the traffic in convict made goods, which were held to be unconstitutional, because they interfered with interstate commerce. A statute passed by the State of Ohio providing for the licensing of persons and corporations selling convict made goods within the State was held unconstitutional in 1897 in Arnold v. Yanders, 56 Oh. St. 417, 60 Am. St. Rep. 753, upon the grounds that the statute interfered with interstate commerce.

A statute of the State of New York requiring that goods made by convicts be labeled or marked "convict made" was held unconstitutional in 1898 in People v. Hawkins, 157 N. Y. 1, 42 L. R. A. 490, upon the grounds that the law interfered with interstate commerce and upon the further grounds that the statute constituted a taking of the property of the seller without due process of law in violation of the 14th Amendment. A bill relative to the marking of goods made

in penal institutions was held to be unconstitutional by the Supreme Judicial Court of Massachusetts in 1912 in Opinion of Justices, 211 Mass. 605, Ann. Cas. 1913B 815, upon the grounds that the statute interfered with interstate commerce.

In each of these cases it was pointed out that Congress has the sole and exclusive power to regulate interstate commerce and that in the absence of an affirmative regulation by Congress it must be taken as its will that such ~~Congress~~ Commerce be free and unrestrained. The failure of Congress was construed to be a regulation that traffic in such goods should be free until Congress otherwise provided. It was thought that, if Congress saw fit, it could remove the impediment to State action by modifying the regulation so as to permit the States to make convict made goods subject to their laws upon arrival within the States in the same manner that intoxicating liquors were made subject to State laws by the enactment of the Wilson Act. The Hawes-Cooper Act was passed to remove this impediment and the several States have enacted laws of various kinds to enable them to carry out their own domestic policies, unobstructed by the impediments of Congressional regulation or power with respect to the matter.

I.

The Hawes-Cooper Act Is Constitutional.

The Hawes-Cooper Act (45 Stat. 1084; 49 U. S. C. A. § 65) does not prohibit the transportation of prison made goods in interstate commerce. On the contrary it permits such transportation and traffic in such goods. It does not grant any powers to the State with respect to prison made goods. It simply removes the impediments of national regulation by

Congress so that the States shall be able to exercise the powers they already possess with respect to such goods. This, we think, is definitely settled by the decision of this Court in In re Rahrer, 140 U. S. 545, which upheld the constitutionality of the Wilson Act and which contains an elaborate discussion of the question here involved.

Before taking up the Rahrer case, it seems to us that the scope of its decision is made plain by a brief consideration of the cases which preceded it, as well as those which have since been decided by this Court. The first of these cases is Bowman v. C. & N. W. Ry. Co., 125 U. S. 465, which was an action to recover damages for wrongful refusal by defendant as a common carrier to receive and transport from Chicago, Illinois, to Council Bluffs, Iowa, a certain quantity of intoxicating liquor (beer). The defense was that the statute of Iowa prohibiting traffic in intoxicating liquors forbids any common carrier to bring within the State of Iowa any intoxicating liquor without a certificate from the County Auditor of the county in which the consignee resides, to the effect that the consignee to whom said liquor is to be transported and delivered is authorized to sell intoxicating liquors in the county. In reply to this defense the plaintiff claimed that so much of the statute as prohibited the transportation of intoxicating liquors into Iowa and delivery thereof to the consignee therein was unconstitutional, because it was an interference with interstate commerce. This Court stated that intoxicating liquors are subjects of commerce and are to be treated as such. It then pointed out that interstate commerce in goods is national in scope and unless regulated by Congress itself is free from any restrictions at all. At page 485, the following language is used:

> "So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases *by the express permission of Congress.*"

In answer to the claim of Iowa that the prohibition was a State inspection law, this Court said at pages 488 and 489:

> "It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to *any known article of commerce,* irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse."

This Court pointed out that a State has legislative control, exclusive of Congress, of all persons, things and transactions of strictly local concern, and may pass a State prohibition law. It held, however, that a State cannot make laws subjecting goods transported in interstate commerce to the laws thereof upon arrival in the State in the original package without the consent of Congress. At page 493 this Court further said:

> "It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal concern. * * * It cannot, *without the consent of Congress,* express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."

In conclusion it was held that an Iowa prohibition law was not a valid exercise of the police power of Iowa because it

operated upon merchandise still in interstate traffic. In disposing of the case this Court said at page 498:

> "The section of the statute of Iowa, the validity of which is drawn in question in this case, does not fall within this enumeration of legitimate exertions of the police power. It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and *property* within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the *merchandise* is brought to its border."

The judgment was reversed and the case remanded for proceeding in conformity with the opinion.

This question was again brought before this Court in the case of Leisy v. Hardin, 135 U. S. 100, which was an action in replevin brought in the State courts in Iowa to recover certain liquor shipped from Peoria, Illinois, to Keokuk, Iowa, which was there seized by the defendant as constable in plaintiff's warehouse in Keokuk. The defendant justified the seizure under the State prohibition law of Iowa. This Court dealt with intoxicating liquors as if they were any other commodity of commerce, not subject to the recognized inherent evil qualities of intoxicating liquors; that intoxicating liquors are lawful subjects of interstate commerce and held that in the absence of Congressional permission the States have no power to legislate with respect to the same while they are in interstate commerce. At page 110 the following language is used:

> "That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, *like any other*

> *commodity* in which a right of traffic exists, and are so recognized by the usage of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus *articles of commerce,* can a State, *in the absence of legislation on the part of Congress,* prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importers?"

At pages 124-5 this Court indicated that if Congress would give its permission the State would have the power to make intoxicating liquors subject to its laws immediately upon arrival therein. It said:

> "The plaintiffs in error are citizens of Illinois, are not pharmacists and have no permits, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman v. Chicago &c. Railway Co., supra, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that *in the absence of congressional permission to do so,* the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

On page 125 intoxicating liquors are referred to as "articles" and "subjects of interstate commerce" and finally on page 125 the Court suggested cooperation between the State and the Federal governments in the following language:

> "to use the language of Mr. Justice Johnson, in Gibbons v. Ogden, 9 Wheat. 1, 238, in 'a frank and candid cooperation for the general good.'"

The decision of the court below was reversed and the case remanded.

These decisions were handed down immediately prior to the enactment of the Wilson Act. The Wilson Act was then passed in conformity with the rules laid down in these cases so as to give congressional permission to the States to enable the States to make intoxicating liquors shipped from points without such States in interstate commerce subject to the laws thereof immediately upon arrival therein, without regard to whether they were still in the original package or not. The constitutionality of the Wilson Act was shortly questioned in the case of In re Rahrer, 140 U. S. 545, which was a proceeding in habeas corpus to the Sheriff of Shawnee County, Kansas, to secure the release of the petitioner, who had been arrested on a charge preferred against him under the statute of Kansas for having in his possession certain beer shipped to him in kegs and barrels by a firm in Kansas City, Missouri. The petitioner claimed that the goods were shipped to him in interstate commerce; that they were still in the original packages when the arrest was made. The defendant justified the arrest under the laws of Kansas and he asserted that the Wilson Act had removed any obstacles and impediments to their enforcement by providing that such liquor shall be immediately subject to the laws of the State upon arrival therein. This Court sustained the contentions of the Sheriff. In answer to the claim that the Commerce Clause of the Constitution of the United States insured that interstate commerce shall be free and that Congress had no power to pass laws restricting such freedom of interstate commerce, Chief Justice Fuller, at page 555, said:

> "The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. *The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regu-*

> *late it, it was left free except as Congress might impose restraint.* Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States."

It was pointed out further that while intoxicating liquors are subject to the laws of the State which may even prohibit all traffic therein, Congress has the power to regulate the interstate commerce in them "like any other commodity." At page 556 this Court further said:

> "Unquestionably, fermented, distilled or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between State and State, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of the courts. Nevertheless, it has been often held that state legislation, which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of a State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or by the amendments thereto."

It was again pointed out that, under the rules laid down in Bowman v. C. & N. W. Railway Co., and Leisy v. Hardin, such traffic was free and unrestrained and not subject to State laws until Congress legislated to give its permission to allow the State laws to operate upon it. In speaking of this, this Court said, at pages 559-60:

> "The laws of Iowa under consideration in Bowman v. Railway Company, 125 U. S. 465, and Leisy v. Hardin,

135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character and must be governed by a uniform system, *so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it,* Congress thereby indicated its will that such commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. *It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.*

"Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?"

Then the Court pointed out that there are certain powers which the States are forbidden to exercise, calling attention to Article 10, Section 1, Clause 1 of the Constitution and certain powers which they may exercise with the consent of Congress—id. Clauses 2 and 3. It was then pointed out that Congress cannot confer legislative power to a State nor adopt State laws as its own. At page 560 this Court said:

> "Nor can Congress transfer legislative powers to a State nor sanction a state law in violation of the Constitution; and if it can adopt a state law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power."

It was urged, however, that the effect of the Wilson Act was a delegation of the legislative power of Congress to the State with respect to the subject of intoxicating liquors. In holding that Congress cannot delegate its power in this manner, it was said (pages 560-61):

> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. *This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates ex proprio vigore as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State.* In other words, *it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things,* and that not only may intoxicating liquors be imported from one state into another, without being subject to regulation under the laws of the latter, *but that Congress is powerless to obviate that result.*"

It was then pointed out that, in the absence of the Commerce Clause, the States had full power to deal with the entire subject of intoxicating liquors; that the Commerce Clause operated as a grant of power to Congress to regulate this subject and that any regulation by Congress was an impediment to State laws which rendered them unconstitutional in so far as they came in conflict therewith. Inasmuch as the failure of Congress to act was construed to mean that

so far as relates to interstate commerce

the rule shall be that such commerce shall be free and unrestrained, the States had no power to act in the absence of congressional permission. It was pointed out that if Congress did act it necessarily must establish regulations limiting that freedom from restraint, which prevailed in the absence of such regulation. At page 561 thereof this Court said:

> *"Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever.* We do not concur in this view. *In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.*
>
> "By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. * * * *But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate com-*

merce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."

It was held that regulation included the power of Congress to prescribe the manner and means of introducing articles in interstate commerce into the States and that no reason was perceived why Congress could not establish a rule which divested such goods of their interstate character than would otherwise be the case. At page 562 this Court said with respect to this matter:

> "The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.
>
> "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.
>
> "We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent."

Finally, this Court was careful to point out that the effect of the Wilson Act was not to grant power to the States to act. The States already had such power. It "simply removed an impediment to the enforcement of the State laws." At page 564 this Court said:

> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence

of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In conclusion it was held that the Wilson Act rendered the liquor subject to the laws of Kansas upon arrival therein in the original packages and that the petitioner was subject to arrest and detention under the laws of said State.

That the power of Congress to regulate interstate commerce includes the power to prescribe the manner of introducing goods into the respective States and to set the time at which such goods shall be subject to the laws of the States has been reiterated many times by this Court. It has been so held not only with respect to intoxicating liquors, but to other articles of merchandise which are properly subject to regulation, i. e., oleomargarin, as was held in the Schollenberger case infra. In addition to the cases which we have cited, we call the Court's attention to Lyng v. Michigan, 135 U. S. 161. In that case it was held that such a regulation was not valid because not sanctioned by Congress. At page 166 it was held that the regulation was unconstitutional, it "not being sanctioned by the authority, express or implied, of Congress, was invalid because repugnant to the Constitution of the United States." This rule was stated in Rhodes v. Iowa, 170 U. S. 412, Vance v. Vandercook, 170 U. S. 438, Vance v. Vandercook, 170 U. S. 468 and in Rosenberger v. Pacific Express Company, 241 U. S. 48. In an opinion by Chief Justice White, the last cited case, it was pointed out:

(a) that from the beginning the States were without power to directly burden interstate commerce;

(b) that the Wilson Act only modifies these controlling rules by causing interstate commerce shipments of intoxi-

cating liquors to come under state control at an earlier date than they otherwise would, that is, after delivery but before sale in the original packages; and

(c) that the power to ship such goods in interstate commerce includes the right to make C. O. D. agreements as to the sale thereof.

Of these propositions the Court, at page 51, said:

> "These propositions in substance have been by necessary implication or by direct decision so authoritatively and repeatedly determined as shown by the cases cited in the margin, that there is no necessity for going further."

In the margin are cited Leisy v. Hardin, In re Rahrer, Rhodes v. Iowa, Vance v. Vandercook and other cases.

In Schollenberger v. Pennsylvania, 171 U. S. 1, it was held that a Pennsylvania statute regulating the manufacture and sale of oleomargarin was unconstitutional in so far as it related to interstate shipments of the same. The Court pointed out that the right of the state to prohibit the sale in the original package was denied to the State in the absence of any law of Congress upon the subject permitting the state to prohibit such sale and that there is no law of Congress relating to articles like oleomargarin. It was, therefore, held that such oleomargarin is in like condition as were the liquors in Leisy v. Hardin and the numerous other cases cited in the opinion. The Court pointed out, however, that as to articles like oleomargarin which are subject to regulation Congress can give its permission. At page 23 the Court said:

> "Subsequent to the decision in the Leisy case and on the 8th of August, 1890, c. 728, 26 Stat. 313, Congress passed an act commonly known as the Wilson act, which provided that upon the arrival in any State or Territory of the intoxicating liquors transported therein they

should be subject to the operation and effect of the laws of the State or Territory enacted in the exercise of its police power to the same extent and in the same manner as though such liquors had been produced in such State or Territory, and that they should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This was held to be a valid and constitutional exercise of the power conferred upon Congress. In re Rahrer, Petitioner, 140 U. S. 545. *In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one State to another continues until a sale in the original package in which the article was introduced into the State."*

It is claimed by the Petitioner that the first Child Labor Case, Hammer v. Dagenhart, 247 U. S. 251, is decisive that the Hawes-Cooper Act is unconstitutional. We submit that there is not even any likeness between the two statutes. We submit that there is no analogy between them. In the Child Labor Case it was held that Congress under the guise of the power to regulate interstate commerce attempted to regulate the internal affairs of the States by prohibiting the employment of children in industry. The Hawes-Cooper Act is not an attempt at all to regulate the internal affairs of States. Like the Wilson Act it is in aid of the exertion of the powers of State governments and leaves the scope thereof entirely to the States. In the language of the Rahrer case it but removes an impediment to State legislation. It was so held by the Supreme Court of the State of Wisconsin in the case of State v. Whitfield, — Wisc. —, 257 N. W. 601.

In Baldwin v. Seelig, 294 U. S. 511, Leisy v. Hardin is cited at page 528 and the rule of that case is recognized. The power of Congress to give its consent to the operation

of State laws upon articles shipped in interstate commerce is recognized. If the State law has for its purpose the application of the State's domestic policy, rooted in its conceptions of morality and order, such regulations are permissible.

II.

Prison Made Goods Are Subject to the Police Powers of the States.

A.

The Scope of the Police Power.

The early decisions of the federal courts, as we interpret them, quite generally limited the exercise by the state of its police power to matters affecting the public health, public morals and public safety, but in the last half century this limitation has been abandoned and these courts, as well as many of the state courts, have enlarged by judicial interpretation the scope of this power to meet the requirements of changing economic and industrial conditions and the growth of the states and the nation. It is now, we think, the consensus of the judicial opinion that the state may exercise its police power not only for the promotion and protection of the public health, public morals and public safety, but also to promote the wealth and prosperity, the comfort, convenience, and happiness, in short, the general welfare of the people of the state.

Black on Constitutional Law (4th Ed.), page 366.
Barbier v. Connolly (1885), 113 U. S. 27.
Mugler v. Kansas (1887), 123 U. S. 623.
Camfield v. U. S. (1897), 167 U. S. 518.

C. B. & Q. Ry. Co. v. People (1906), 200 U. S. 561.
Sligh v. Kirkwood (1915), 237 U. S. 52.
Blaisdell v. Home Building and Loan Association (1933), 189 Minn. 442, 448; 249 N. W. 334, 893; 290 U. S. 398; 54 S. Ct. 231.

In C. B. & Q. Ry. v. People, supra, at page 592 this court said:

"The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. * * * We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. Lake Shore & Mich. South. Ry. v. Ohio, 173 U. S. 285, 292; Gilman v. Philadelphia, 3 Wall. 713, 729; Pound v. Turck, 95 U. S. 459, 464; Railroad Co. v. Husen, 95 U. S. 470. And the validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation."

In Sligh v. Kirkwood, supra, at page 58, the court said:

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as

men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. Camfield v. U. S., 167 U. S. 518, 524. *It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or public health.* Chicago, etc., Ry. v. Drainage Commissioners, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity.' And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' Eubank v. Richmond, 226 U. S. 137, 142."

It was long ago decided in the Legal Tender Cases (1870), 12 Wall. 457, that "It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times." (P. 540). This principle has been reaffirmed by our courts many times since, and it is now well established that in emergencies state and nation alike may, under the police power, pass laws which in normal times would im-

pair the obligation of contracts and deprive persons of their property without due process of law.

In Barbier v. Connolly (1885) supra, at page 31, the court said:

> "Neither the Amendment (referring to the Fourteenth) —broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

In Manigault v. Springs (1905), 199 U. S. 473, at page 480, the court said:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power which in its various ramifications is known as the police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

In Atlantic Coast Line Railroad Co. v. City of Goldsboro (1914), 232 U. S. 548, at page 558, the court said:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of a state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained

away, and is inalienable even by express grant and that all contracts and property rights are held subject to its fair exercise."

In Union Dry Goods Co. v. Georgia Public Service Corporation (1919), 248 U. S. 372, at page 376, the court said:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government and no obligation of a contract can extend to defeat the legitimate government authority. * * * It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community."

In New Orleans Gas Co. v. Louisiana Light Co. (1885), 115 U. S. 650, at page 672, the court said:

"The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety as the one or the other may be involved in the execution of such contracts."

In Marcus Brown Holding Co. v. Feldman (1921), 269 F. 306, affirmed in 256 U. S. 170, the court, at page 315, said:

"It cannot be too often said that a constitution is not a code nor a statute, that it declares only fundamental principles, and is not 'to be interpreted with the strictness of a private contract.' Legal Tender Cases, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. To this doctrine we owe the rulings that even the contract clause of the Constitution does not override the power of the state to establish regulations reasonably necessary to secure the health, comfort, or general welfare of the community—that is, to exercise the police power of the state (Atlantic, etc., Co. v. Goldsboro, 232 U. S. 548,

34 Sup. Ct. 364, 58 L. Ed. 721); that in like manner 'reasonable restraints' may be placed upon freedom of contract (Rail & River Co. v. Ohio, etc., Comm'n, 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607); and that a Legislature may make police regulations, although they interfere with the full enjoyment, of private property, and no compensation be given (Chicago, etc. Co. v. Drainage Comm'n, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175). Such decisions (and we cite but few of many) reduce the question to this: Are these statutes an exercise of police power reasonably suitable for combating or lessening the evil proved, and therefore constitutional, although at other times and under other circumstances they might plainly be obnoxious to fundamental principles of constitutional government?"

In People v. LaFetra, 230 N. Y. 429, 442; 130 N. E. 601, 605, the court said:

"The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power, although the rights of private property are thereby curtailed and freedom of contract is abridged. * * * The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must, when necessary, yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare. * * *

"Emergency laws in time of peace are uncommon, but not unknown. Wholesale disaster, financial panic, the

aftermath of war (Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, 161, 40 Sup. Ct. 106, 64 L. Ed. 194), earthquake, pestilence, famine and fire, a combination of men or the force of the circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (Bowditch v. Boston, 101 U. S. 16, 18, 19; American Land Co. v. Zeiss, 219 U. S. 47. Although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war (Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281), an emergency may afford a reason for putting forth a latent government power already enjoyed but not previously exercised."

In Guttag v. Shatzkin, 230 N. Y. 647, 650; 130 N. E. 929, 930, the court said:

"While the states are subject to the contract clause of section 10, article I, and section 1, article XIV of the United States Constitution, the police power of the states may affect contracts and modify property rights without violation of these provisions. Conceding the health, safety, and morals of its citizens to be involved, and the circumstances to justify a proper interference by the state, neither the contract nor due process of law clause stand in the way. Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372. These sections of our federal Constitution and the police power of the states harmonize and never conflict."

In Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 437, it was held that the economic interests of the State may justify the exertion of the police power.

In the case of Nebbia v. New York, 291 U. S. 502, it was held that both property and contract rights must yield to the public good if necessity requires. At page 523 of the opinion, this Court says:

"Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. As Chief Justice Marshall said, speaking specifically of inspection laws, such laws form 'a portion of that immense mass of legislation, which embraces every thing within the territory of a State. * * * all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, * * * are component parts of this mass.'"

It was pointed out that the Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases and that certain kinds of business may be prohibited in the public interest (Pages 527-28). It is not necessary that a business be inherently bad in order to subject it to police regulation. It is sufficient to subject a business to police regulation if its results are evil.

In Booth v. Illinois, 184 U. S. 425, a statute prohibiting the sale of stock and grain on margin was sustained. It was pointed out that such business is not immoral (Page 429), but that the business results are evil because of interference with prices and delivery (Page 430). We shall point out infra that the traffic in convict made goods results in interference with prices and demoralizes business and re-

sults in social evils, which justify the exertion of the police power to suppress the evils resulting therefrom.

In Brodnax v. Missouri, 219 U. S. 285, a similar statute of Missouri prohibiting sales of stocks, bonds and certain commodities on margin was held to be constitutional. It was pointed out that such transactions in themselves are not immoral or inherently bad, but that the effect of such dealing in such contracts has a bad effect upon business and public morals (Pages 292-93).

In Otis v. Parker, 187 U. S. 606, a provision of the Constitution of California prohibiting dealings in stocks and bonds upon margin was held to be constitutional. It was pointed out that such dealings in themselves are not inherently bad and that they are not immoral. It was also pointed out that such dealings have resulted in evil social consequences and that the Court was unable to say that the constitutional provision did not bear a reasonable relation to the evil sought to be cured and that it was constitutional (Pages 608-9).

In Murphy v. California, 225 U. S. 623, an ordinance prohibiting pool rooms was held to be constitutional. It was held that playing at billiards is a lawful amusement (Page 629); that the ordinance was aimed at the place in which the game is played and not at the game (Page 619) and that it was a proper exercise of the police power to suppress the evils resulting from the game, citing and quoting Booth v. Illinois, supra (Pages 629-30). This case was followed in Clarke v. Deckebach, 274 U. S. 392, upholding an ordinance of Cincinnati prohibiting the operation of pool rooms by aliens (Page 397).

In McCloskey v. Tobin, 252 U. S. 107, a statute prohibiting the soliciting of claims by one not an attorney at law was sustained, although the business itself is "not inherently evil" (Page 108).

In Powell v. Pennsylvania, 127 U. S. 678, a statute of Pennsylvania was upheld which prohibited the manufacture or sale of oleomargarin. It was pointed out that oleomargarin is a wholesome, nutritious food; but that by reason of the fact that fraud and deception is practiced in the business by which the public is induced to purchase oleomargarin instead of butter and which the public would not buy if it were advised as to the transaction. It was held that inasmuch as the business results in these evils the Legislature was justified in prohibiting it (Page 686).

In Baccus v. Louisiana, 232 U. S. 334, it was held that the peddling of drugs or medicines may be prohibited, even though the business itself is not an evil one, but because of evil consequences which flow from it.

Upon the same grounds, it was held in Dillingham v. McLaughlin, 264 U. S. 370, that a statute was constitutional which prohibited any other than a corporation from engaging in the banking business.

Each and every of the statutes upheld in the cases which we have just cited related to businesses which in themselves are not harmful. Some of these businesses are attended with evil consequences and practices, which this Court has held justified the exertion of the police power to regulate and suppress them at the discretion of the State Legislature.

B.

The Traffic in Convict or Prison Made Goods Is Attended With Evils Which Justify the Exertion of the Police Power.

It is attended with fraud, deception and unfair trade practices. These consist in many instances of labels upon said products which would lead the purchaser to believe that the same were manufactured in a factory by a regular manufacturer. We feel confident in the assertion that, in the absence of legislation requiring it, such goods never bear a label showing that they were made in a prison or by convict labor. As a matter of fact the contracts of the contractors with the prison authorities for such products generally contain a clause that the contractor shall have a right to rescind the contract if Federal or State legislation shall be enacted requiring a label to show the origin of such goods. Such a contract is printed in full in the case of Rice v. State, 108 Okla. 4, 232 Pac. 807. That contract was one between the Cherokee Manufacturing Company and the State of Oklahoma by which the State agreed to manufacture certain shirts and garments for the company. In the contract it is provided that labels shall be attached and that the cloth and all other goods used in the manufacture of the garments shall be subject to the approval of the company. These goods are then sold by the company as its product. To protect itself against such legislation Section 8 of the Contract, which is printed in the opinion, provides that the company shall have a right to cancel the contract if Federal or other legislation shall require it to label its goods so as to show that they were made in a prison. These goods are marketed

not as prison made goods, but as the goods of a manufacturer.

That this is an unfair trade practice and a deception and a fraud upon the public is established by all the decisions.

A representation by one marketing goods that he is a manufacturer when he is not is a deception and fraud and unfair practice, which may be suppressed by the exercise of governmental power. It was held that Congress may suppress such practices in interstate commerce through the Federal Trade Commission by this Court in the case of Federal Trade Commission v. Royal Milling Company, 288 U. S. 212. In that case the respondent marketed pancake and other flour which it purchased from other manufacturers. The article was put up and sold by the defendant as its product under the name of the Royal Milling Company. It was held that the use of the words "milling company" and other words of like import would lead the purchaser to believe that he was purchasing a product of the respondent when in fact he was not and that thereby a deception was perpetrated and an unfair practice indulged in. In speaking of the practice of the defendant, this Court, at page 215, said:

> "Respondents have circulated written and printed circulars among the trade which either directly assert, or are calculated to convey the impression, that their product is composed of flour manufactured by themselves from the wheat."

Of the right of the public to know what it is purchasing, at page 216, the Court said:

> *"If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon*

them an exactly similar article, or one equally as good, but having a different origin."

It held that the respondent's acts deceived the public and that the Federal Trade Commission was justified in making an order to desist from using the words "milling company" or other words of like import and at page 217 the Court further said:

"The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, *and which they might or might not buy if correctly informed as to its origin.* We are of the opinion that the purchasing public is entitled to be protected *against that species of deception, and that its interest in such protection is specific and substantial."*

Not only are prison made goods sold under labels which do not disclose their origin and which deceive the public into believing that they are made in factories instead of prisons, but in many cases as the records of the Senate Committee disclose, such goods bear false labels and are dumped into the markets of the States to demoralize and ruin business. Rep. No. 344, U. S. Senate, 70th Congress, 1st Session, Page 4. It is a well known fact, too, that these goods are dumped upon the markets by dealers at sales which are widely advertised, in which the dealers assert that they have purchased a large quantity or an entire output of such products. People are led to believe that the merchant has purchased the entire output of a manufacturer and that he is enabled to charge a low price for the goods because of the large purchase which he has made. The fact of the matter is that the merchant is enabled to charge a low price because the goods are prison or convict made and this fact is carefully concealed from the public.

The right of regulation exists even though no private rights are invaded. The public has rights in this respect which can be and are protected by legislation. In Federal Trade Commission v. Klesner, 280 U. S. 19, at page 27, this Court said:

> "But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. *Public interest may exist although the practice deemed unfair does not violate any private right.* In Federal Trade Commission v. Beech Nut Packing Co., 257 U. S. 441, a practice was suppressed as being against public policy, *although no private right either of a trader or of a purchaser appears to have been invaded.*"

To the same effect is Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483.

In Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67, it was held that the marketing of California Pine as White Pine is a deception and a fraud and unfair practice which the Federal Trade Commission was justified in suppressing. This decision emphasizes the right of the public to get what it chooses, even though the choice may be dictated by caprice or by fashion or even by ignorance. At page 78 this Court says:

> "Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. *The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else.* Federal Trade Comm'n v. Royal Milling Co., 288 U. S. 212, 216; Carlsbad v. W. T. Thackeray & Co., (C. C.)

57 Fed. 18. *In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."*

In Sears, Roebuck & Company v. Federal Trade Commission, (7th CCA) 258 Fed. 307, 6 A. L. R. 358, the petitioner was found guilty of having indulged in unfair trade practices which the Commission had suppressed. These consisted of representations of buying sugar, coffee and tea in large quantities from producers, even in foreign countries, and that by reason thereof petitioner was able to sell the same at a lower price than its competitors. The inference was that petitioner's competitors overcharged the public. It was held in that case that one may be found guilty of intentionally injuring and discrediting competitors by falsely leading the public to believe that they were unfair dealers by falsely advertising that because of petitioner's handling commodities in large quantities and buying direct from manufacturers and producers his goods cost less and therefore could be sold for less. The order of the Federal Trade Commission that petitioner desist from such practice was sustained. The decision in this case denounces the practices, which attend the traffic in prison made goods—misrepresentations as to the origin of goods, which in the case at bar consists of representing the goods as being those of manufacturers instead of being prison made; that the price is low by reason of purchases by dealers of large quantities or entire outputs of factories instead of their being low on account of being prison made, and causing labels to be attached which are calculated to convey the impression that the goods are made by a manufacturer in a factory instead of in a prison by convicts. In short the practices of prison contractors and merchants, who dispose of prison made

goods, are of such character as to justify the exertion of the police power to regulate and suppress them.

That the public has a right to be advised as to the goods which it purchases is well settled. Nobody has a right to represent his goods as the goods of somebody else. Nobody has a right to make any false, misleading or deceptive representations as to his goods. It is not necessary that an express representation be made. It is sufficient if the goods are marked in such a way as to result in the public's being deceived or misled.

In Charles Broadway Rouss, Inc. v. Winchester Co., 300 Fed. 706, at page 715, the Court says:

> "As Lord Halsbury said in Reddaway v. Banham (1896) A. C. 199, *nobody has any right to represent his goods as the goods of somebody else. That principle of law underlies all the decisions in the cases involving unfair competition.*"

In Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 673, Chief Justice Fuller said:

> "In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, *and the public is entitled to the means of distinguishing between those, and other goods; and protection is accorded against unfair dealing, whether there be a technical trade mark or not.* The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

In the case of Corn Products Refining Company v. Eddy, 249 U. S. 427, a statute of Kansas requiring that all syrup compounds be branded and labeled so as to show the ingredients thereof was held to be constitutional. At page 431 Justice Pitney said:

> "And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold.
>
> "Evidently the purpose of the requirement is to secure freedom from adulteration and misbranding; the mischief of misbranding being that purchasers may be misled with respect to the wholesomeness or food value of the compound. And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."

Statutes of Iowa and Pennsylvania providing that manufacturers of ice cream shall state the butter-fat content thereof were held to be constitutional in Hutchinson Ice Cream Company v. Iowa, 242 U. S. 153, in which this Court said:

> "Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power."

A similar State statute of North Dakota requiring the labeling of lard so as to state the ingredients thereof and the sale of it in cans containing 1, 3 or 5 pounds or multiples thereof was held to be constitutional in Armour & Co. v. North Dakota, 240 U. S. 510.

In Heath & Milligan Manufacturing Company v. Worst, 207 U. S. 338, a statute of North Dakota requiring the labeling of paint containers and stating the ingredients of the paint was held to be constitutional.

In Savage v. Jones, 225 U. S. 501, a statute requiring the labeling of commercial feeding stuff, stating the ingredients thereof, was held to be constitutional.

In State v. Buck Merc. Company, 38 Wyo. 47, 57 A. L. R. 675, a statute as upheld which required the disclosure by label of materials or ingredients of certain articles sold and to specify the wool content thereof. Numerous other instances could be cited—

Schmidinger v. Illinois, 226 U. S. 578 (weight of bread);

Stolz v. Thompson, 44 Minn. 271, supra (contents of baking powder);

State v. Aslesen, 50 Minn. 5; (contents of lard substitutes);

State v. McKay, 137 Tenn. 280, Ann. cas. 1917 E, 158 (purity of seeds).

In Parrott & Company v. Benson, 114 Wash. 117, 194 Pac. 986, the Court said:

> *"We cannot hold anything to be unjust discrimination or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is."*

These authorities establish beyond any doubt that the business of dealing in prison or convict made goods is attended with evils that justify the exertion of the police power to suppress them and protect the public. They are a complete answer to the opinion of O'Brien, Judge, in People v. Hawkins, supra, in which he stated that the public does not have the right to know the origin of the goods or any of the other matters relating to the same. They demonstrate

the correctness of the views expressed in the dissenting opinions by Parker, Ch. J. and Bartlett and Haight, J. J.

Furthermore the States are justified in exerting the police power to protect the markets from the injurious effects of dumping prison and convict made goods. The evils flowing from the traffic in convict made goods are much greater than those referred to in Booth v. Illinois, Brodnax v. Missouri, Otis v. Parker and other cases cited supra. It is much greater than the evil flowing from the operation of pool rooms, in which the idle and sometimes the criminal congregate. The traffic in prison made goods results in the demoralization of industry. It strikes down the manufacturer, the merchant and the worker. It is akin to the oleomargarin industry which this Court held in Powell v. Pennsylvania, supra, may be suppressed by a State because of its attendant evils and harmful consequences. It is a matter of common knowledge that industries employing free labor are required to pay taxes, interest on capital, and other items of overhead, which are not included in the cost of prison made goods, and cannot compete successfully in price with prison made goods. Nor are they subject to the business practices and other evils and injurious consequences of the latter. Prison made goods can be sold to meet the lowest prices quoted in the market and when the market is saturated a profit still can be made at a price which is below the actual cost to the products of free labor.

By the ruination of industry, commerce and labor, the income of a substantial part of the people is destroyed, which results in economic loss to those immediately affected and in the destruction in part of the market of the American farmer and in turn the latter's own purchasing power to buy the products of industry. The commerce in prison

made goods is a destructive and disturbing force to manufacturing, merchandising and labor, which has its evil and harmful effects throughout the entire business structure.

From a social and economic standpoint, the unrestricted sale of prison made goods is dangerous. The social and economic situation is identical with that which arose in connection with slave labor, which was largely responsible for the impoverishment of the so-called poor white who owned no slaves and who could not compete with those owned by others. Of course, convict labor is not likely ever to assume the proportions of slave labor, but the difference in its effect is one of degree and not one of economic principle.

The Federal Government and the States have long recognized the evils flowing from convict labor and prison made goods. This has been pointed out in the authorities which we have already cited. In addition we cite Manthey v. Vincent, 145 Mich. 327, 108 N. W. 667; Shenandoah Lime Company v. Governor, 115 Va. 865; Bailey v. Alabama, 219 U. S. 219, Rep. No. 344, U. S. Senate 70th Congress, 1st Session, supra.

The policy of the United States has been to exclude prison labor from coming in competition with free labor. The importation of convict goods is prohibited. c. 356, Title III, § 307, 42 Stat. 937; c. 497, Title III, § 307, 46 Stat. 689.

The Postal Department is prohibited from purchasing convict made goods. c. 1759, § 1, 33 Stat. 435.

The inmates of narcotic farms are employed in factories or shops only to manufacture articles and commodities for the use of the United States. c. 82, § 9, 45 Stat. 1087.

The Federal Government is prohibited from procuring goods made by convict labor except as provided by existing law. c. 314, § 602, 47 Stat. 418.

Other statutes relating to this general matter have been passed by Congress.

The evils flowing from the traffic in convict made goods are recognized to be as injurious as the traffic in intoxicating liquors and oleomargarin. The difference is only in degree and not in the character of the evil resulting from such traffic.

If it is necessary under the rule laid down in Clark Distilling Company v. Western Maryland Railway Company, 242 U. S. 311, to show that the commerce regulated is subject to evils and practices which justify the States in exercising their police power with respect to the same, it has been shown, we believe, that evils and practices attend the traffic in prison made goods, which justify the exertion of the police power of the States and the regulation of interstate traffic therein by Congress.

It is no answer to this argument to say that the products of prison made labor are in themselves harmless or that they are, on the contrary, useful and beneficial. If the traffic in prison made goods is productive of harm and evil, this is a sufficient justification for the exercise of the police power. In Booth v. Illinois, supra, this Court said:

> "'If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.'"

In Purity Extract and Tonic Company v. Lynch, 226 U. S. 192, in upholding the statute of Mississippi which prohibits the sale of malt liquors, the Court pointed out that such liquors in and of themselves may be harmless, but that the traffic in them is productive of evils which justifies the State in entirely prohibiting the business. At page 201 this Court said:

> "It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. *It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.*"

Questions of expediency and wisdom of such legislation are for the legislative branch of the Government. In this respect, too, this case is entirely different from the first Child Labor Case. Here the purpose of the law is to regulate a business and traffic in goods which is productive of social evils and which is harmful to the public. Under the Hawes-Cooper Act it is proposed that the States themselves shall be permitted to exercise this power. In the Child Labor Case Congress itself, under the guise of exercising its power to regulate interstate commerce, attempted to regulate the internal affairs of the States so as to prohibit child labor. The argument made in the Child Labor Case that the products of child labor are harmless has no application here, because this case, in so far as relates to the police power of the States, involves the right of the States to suppress a business which is attendant with resulting consequences which are

harmful and evil to the public. The only question in this respect is whether the States themselves may exercise their police power to regulate and suppress a harmful and injurious business. That the States have such power is well established by the authorities which we have cited.

CONCLUSION.

In conclusion we submit that the rule is well settled that Congress has the power to provide how prison made goods shall be introduced into the States and when the protection of the interstate commerce laws shall cease, and that it may remove the impediments created by the Federal rules relating to interstate commerce so that the States may exercise their police power unrestrained and untrammelled by Federal regulation. We submit further that the evil that inheres and results from the traffic in prison or convict made goods is such as to justify the States in exerting their police power in regulating and suppressing the same in the discretion of the Legislatures of the respective States. Therefore, we submit that the Hawes-Cooper Act is constitutional and that the laws of Ohio and other States regulating and suppressing traffic in prison made or convict made goods are constitutional. The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX.

LAWS OF MINNESOTA, 1935

CHAPTER 267—S. F. NO. 437

An act to subject all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners of other states to the laws of the State of Minnesota.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods to be subject to laws of state.—That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, (except convicts or prisoners on parole or probation,) or in any penal and/or reformatory institutions transported into the State of Minnesota, and remaining therein for use, consumptions, sale, or storage, shall upon arrival and delivery in the State of Minnesota, be subject to the operation and effect of the laws of the State of Minnesota, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in the State of Minnesota, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. Effective September 1, 1935.—This act shall take effect and be in force from and after September 1, 1935.

Approved April 24, 1935.

CHAPTER 268—S. F. NO. 438

An act to require the branding or marking of prison or convict made goods, wares and merchandise offered for sale or intended for sale in this State, providing penalties for violation thereof, and to repeal Chapter 138, Laws of Minnesota for 1929.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods must be marked.—That all goods, wares and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, (except convicts or prisoners on parole or probation), or in any penal and/or reformatory institutions in this or any other state shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed or sold without such brand, label or mark thereon.

Sec. 2. Must contain the words "Prison made."—The brand, label or mark required by Section 1 hereof shall contain at the head or top thereof the words "Prison Made" followed by the year and name of the penal and/or reformatory institution in which it was manufactured, produced, or mined in plain English lettering of the style known as great primer roman capitals. Such brand or mark, if the article will permit, shall be placed upon it and when such branding or marking is impossible, a label shall be used and attached. Such brand, mark or label shall be placed or attached outside of and on a conspicuous part of the finished article so as to be plainly visible to the purchasing public and also shall be placed outside of its box, crate or covering.

Sec. 3. Sale of unmarked goods forbidden.—That no person shall sell, offer for sale, or have in possession for the purpose of sale, goods, wares or merchandise described in Section 1 of this Act without the brand, label or mark required by this Act being placed thereon or attached thereto, or remove, conceal or deface such brand, label or mark.

Sec. 4. Violation a misdemeanor.—Any person who violates any of the provisions of this Act shall be guilty of a misdemeanor.

Sec. 5. Law repealed.—Chapter 138 of the Laws of Minnesota for 1929 is hereby repealed.

Sec. 6. Effective September 1, 1935.—This Act shall take effect and be in force from and after September 1, 1935. Approved April 24, 1935.

LAWS OF MINNESOTA, 1929

CHAPTER 138—H. F. NO. 216

An act to require the branding, labeling or marking of prison or convict made goods, wares and merchandise offered for sale or intended for sale in this State and providing penalties for violation thereof.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Prison made goods to be labeled.—Goods, wares and merchandise made by convict labor under contract in this or any other State imported, brought or introduced into this State, shall be branded, labeled or marked as hereinafter provided before being exposed for sale, and shall not be so exposed without such brand, label or mark.

The brand, label or mark required by the next preceding section shall contain at the head or top hereof the words

"prison made" followed by the year and name of the penitentiary, prison, reformatory or other establishment in which it was made, in plain English lettering of the style known as great primer roman capitals. Such brand or mark, if the article will permit, shall be placed upon it and when such branding or marking is impossible, label shall be used. Such brand, mark or label shall be placed outside of and in a conspicuous part of the finished article and its box, crate or covering.

A person dealing in convict made goods, wares or merchandise, as described in this chapter, shall not knowingly have them in possession for the purpose of sale, or offering them for sale without the brand, label or mark required by this chapter, or remove, conceal or deface the brand, label or mark thereon; but the provisions hereof shall not apply to such goods, wares or merchandise in possession of any such person at the time of the taking effect of this act.

Whoever violates any provision of this law shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not more than $100 or not to exceed 90 days imprisonment. Approved April 5, 1929.